Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

PHILLIPS-BUTTORFF MANUFACTURING COMPANY, PETITIONER,

VS.

WILLIAM JOHNSON, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

JURISDICTION.

(a) The opinion and judgment of the Supreme Court of Tennessee was rendered for publication and filed on April 4, 1942, and is printed on pages 60 to 67 of the record. It has not yet been officially reported.

(b) A final judgment or decree has been rendered in this cause by the Supreme Court of Tennessee, which

is the highest court of the State of Tennessee in which a decision in the suit could be had, where respondent's right is specifically set up and claimed under a statute of the United States of America, to-wit, Fair Labor Standards Act, which right rests exclusively upon an interpretation and application of said Federal statute, and review by certiorari under Section 240 of the Judicial Code, 28 U. S. C. A. 347, is the proper procedure.

II.

STATEMENT OF THE CASE.

The essential facts, all of which were stipulated, have been summarized in the foregoing petition. Under the stipulation respondent actually spent twelve out of thirteen of his working hours as a nightwatchman in the large retail store. There is nothing in the stipulation to show that any interstate commerce was transacted in this retail store *even in the day time.*

The one hour of working time devoted by respondent to the other two buildings constituted less than ten percent of respondent's working time, and furthermore this hour was devoted to two buildings where no activities were in progress during the night time and where during the day time sixty-five percent of all business transacted related solely to intrastate commerce.

The question presented is whether or not a nightwatchman who regularly devotes more than ninety percent of his time to a retail store not shown to involve interstate commerce, and whose remaining time is devoted to watching buildings which during the day time house activities which are predominantly intrastate in character, is performing work which is so directly related to commerce or the production of goods for commerce as to be within the provisions of the Fair Labor Standards Act.

III.

SPECIFICATION OF ERROR.

The Supreme Court of Tennessee erred in holding that respondent Johnson was engaged in an employment having a substantial relation to commerce and the production of goods for commerce, and that such employment came within the protection of the Fair Labor Standards Act.

IV.

ARGUMENT.

The Supreme Court of Tennessee predicated its conclusions upon its previous decision in *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. 2d 432, saying:

> "We still think it proper to adhere to the ruling made in *S. H. Robinson & Co.* v. *LaRue*, unless a different ruling is made by a higher authority."
> (Record p. 62.)

The case of *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. 2d 432, involved a nightwatchman whose *entire time* was devoted to watching "materials during the night hours as they were unloaded from trucks, while stored on the yard, and when loaded in freight cars for shipment before the cars were moved."

The nightwatchman in the Robinson case performed no duties excepting those relating directly to commerce; respondent Johnson performed no duties whatever relating to commerce or the production of goods for commerce except during less than ten percent of the time and these duties were performed in connection with two buildings housing activities stipulated to be predominantly intrastate in character. LaRue performed his duties while commerce was actually in progress; Johnson worked only during the night time when no activities were in progress in any of the buildings.

Since the decision in this cause, the Supreme Court of the United States has delivered its opinion in *Kirschbaum, Petitioner,* v. *Walling, Administrator,* and *Arsenal Building Corp., Petitioner,* v. *Walling, Administrator,* Nos. 910 and 924 in this Court, October Term, 1941. Prior to the opinion in these cases the various courts of the land had undertaken to determine whether or not nightwatchmen were covered by the Fair Labor Standards Act by devising an abstract formula—searching "for a dependable touchstone" of inclusion or exclusion.

The Supreme Court of North Carolina in *Hart* v. *Gregory,* 16 S. E. 2d 837, held that the occupation of nightwatchman was not within the provisions of the law, unless the nightwatchman performed additional duties, such as keeping a boiler filled or looking after running machinery.

In *Wood* v. *Central Sand & Gravel Co.,* 33 Fed. Supp. 40, a Federal District Judge in Tennessee held that a nightwatchman who fired the engine so as to keep up steam and have the engine ready for use each morning was included within the Act.

On the other hand, in *Rogers* v. *Glazer,* 32 Fed. Supp. 990, a Federal District Judge in Missouri held that a nightwatchman in an automobile graveyard was not within the provisions of the Act even though it was a part of his continuing duty to watch a small amount of scrap iron which was to be shipped in interstate commerce.

In *Lefevers* v. *General Export Iron & Metal Co.,* 36 Fed. Supp. 838, a Federal District Judge in Texas held that a nightwatchman was included within the Act by distinguishing his case from *Rogers* v. *Glazer, supra,* upon the ground that the nightwatchman in the latter case performed his services "almost entirely" in connection with a retail store or intrastate affairs.

In its statement of the law this Court, in the recent cases referred to above, in the opinion delivered by Mr.

Justice Frankfurter, made it clear that no fixed formula could be adopted with respect to nightwatchmen and declared that each case must be determined *by its own facts.* In the Kirschbaum and Arsenal Building Corp. cases, the activities conducted in the buildings to which the watchmen devoted their entire time were almost exclusively interstate in character. Mr. Justice Frankfurter said:

> "Practically all of the tenants manufacture or buy and sell ladies' garments. Concededly, in both cases the tenants of the buildings are principally engaged in the production of goods for interstate commerce."

This Court therefore held that the watchmen in question, who devote their entire time to buildings in which interstate commerce and production for interstate commerce was in progress, were within the Act, holding that it

> "encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants."

However, the Court *further* said:

> "But the provisions of the Act expressly make its application dependent upon the character of the employees' activities."

And while this Court did not undertake to lay down a rigid *formula,* it did announce the following *principle* which is directly applicable to the present case:

> "We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the production of goods for commerce."

It is respectfully submitted by petitioner that the slight activity of Johnson in leaving the retail store (*where there was no proof of any interstate activities*) and visiting the two additional buildings which were stipulated to house goods and activities that were sixty-five percent intrastate commerce—activities consuming less than ten percent of his total employment and relating to buildings predominantly intrastate in character —fails to affirmatively show "a close and immediate tie with the process of production for commerce," and therefore the relation of Johnson's work to commerce or the production of goods for commerce is so tenuous that it was not in any fitting sense either a part of commerce or necessary to the production of goods for commerce.

It is earnestly submitted that the present petition involves a case well within the quotation made by Mr. Justice Frankfurter near the conclusion of the opinion in the Kirschbaum and Arsenal Building Corp. cases:

> "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation."
>
> Mr. Justice Cardozo in *Gully* v. *First National Bank*, 299 U. S. 109, 117.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Tennessee and finally reverse it.

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